as I have previously stated, on the 23rd February, 1932.

For these reasons I am of opinion that the Plaintiffs must succeed on the whole of their claim against the 1st Defendant, and I give Judgment for the Plaintiffs accordingly, with costs.

Judgment accordingly.

Solicitors for the plaintiffs— *Rodyk & Davidson.*

Solicitors for the first Defendant— *Sisson & Delay.*

(Original Civil Jurisdiction)

Prichard, J.

February 28, 1933.

RAHAMIN PENHAS and ABRAHAM PENHAS trading as RAHAMIN PENHAS.....Plaintiffs

vs.

KISHNAN CHAND & SONS, and the firm of KANSHIRAM PARMANAND.....Defendants

(Penang Suit No. 11 of 1933)

Sale of goods—purchaser taking possession subject to Trust Receipt—subsequent fraudulent sale—good faith—notice of warranty of authority—onus of proving —Factors Act 1889, Ss. 2 (1), 9.

The plaintiffs agreed to sell to the first defendants 540 cases of vegetable fat and drew on them 3 several Bills of Exchange to cover the price thereof. They discounted the bills with the Hongkong and Shanghai Bank (Singapore Branch) and delivered 2 Bills of Lading as security for due acceptance and payment of the Bills of Exchange. The Bank was not to part with possession of the goods except to the first defendants who were to hold the goods on trust under a Trust Receipt. The first defendants accepted the bills of exchange and signed a Trust Receipt. The Bills of Lading were then handed to the first defendants who afterwards took possession of the goods. They delivered 535 cases of the vegetable fat to the second defendants at an agreed price. The first defendants, however, did not make any payments to the Bank. Their Bank later assigned the Bills of Exchange together with the appurtenant rights to the plaintiffs.

In an action by the plaintiffs against the defendants for the return of the cases of vegetable fat or their value and damages for their conversion:—

Held, on the evidence, that the 2nd defendants had not discharged the onus on them of proving good faith and absence of notice of warranty of authority; the plaintiffs in the circumstances should succeed in the action.

Heap v. Motorists' Advisory Agency, (1923) 1 K.B. 577 applied.

ACTION tried by Prichard, J.

The material facts are fully set out in the Judgment below.

Hume & Pooley for the plaintiffs.

Hogan & Saunders for the 2nd defendants.

The 1st Defendants did not enter appearance.

Cur. Adv. Vult.

Prichard, J.—This is a claim for the return of a certain number of cases of vegetable fat (ghee) or their value, and damages for their conversion.

The first defendants did not enter an appearance. In this firm the manager was named Narayan Dass, and his father Kishan Chand.

The following facts were proved.

All the parties are merchants. On the 23rd December, 1932 the first defendants agreed to purchase from the plaintiffs 540 cases of 'cowboy' brand of vegetable fat (ghee) at $12.50 a case. On the 24th December the plaintiffs, as owners of the ghee, drew three Bills of Exchange on the first defendants, for $2,253, $2,249 and $2,248 respectively. The first of these was payable 45 days, the second 60 days, and the third 75 days, after sight. On the same day they discounted the bills with the Hongkong & Shanghai Bank (Singapore branch) and endorsed and delivered to the Bank two bills of lading each covering 270 cases as security for the due acceptance and payment of the Bills of Exchange, and they instructed the Bank not to part with the possession or control of the goods except to the first defendants and upon the terms that the first defendants should hold the goods upon trust under a Trust Receipt. The first defendants agreed to these terms and they accepted the Bills of Exchange and signed the Trust Receipt, which runs as follows:—

" TRUST RECEIPT

" (Hypothecated Shipping Documents)

"S.S. Stamp 25c. Penang, 28th December, 1932

"To the

" Hongkong & Shanghai Banking Corporation,

" (Incorporated in Hongkong)

" Penang.

" In consideration of your handing to $\frac{me}{us}$ Shipping "Documents for goods, as per particulars at foot, "hypothecated to the Bank as collateral security for the "due payment of the undermentioned drafts drawn "upon $\frac{me}{us}$ by Messrs. Rahiman Penhas, Singapore and "accepted by us $\frac{I}{we}$ hereby engage to land, store, and "hold the said goods as Trustee for and on behalf of "the Bank, and in the event of the goods or any portion "thereof being sold and delivered before full payment "of the said drafts the proceeds of such sales shall be "received by $\frac{me}{us}$ as Trustee for the Bank, and paid to "the Bank when and as received $\frac{I}{we}$ at the same time "specially advising the Bank of the account on which "such payment is made.

" $\frac{I}{we}$ also undertake to keep the goods fully insured "against fire as against marine risks and to hand over to "the Bank all amounts received from the Insurers, the "Policies of Insurance being in the meantime held "by $\frac{me}{ns}$ as Trustee for and on behalf of the Bank.

" Yours faithfully,

" Kishnan Chand & Sons.

" Sd. N. Dass

" Manager

" (Penang Branch)

"S'pore B/R No. 68/3611/3
"Authorised by S'pore
" Sd. (Illegible)"

After the signature the Bank handed to the first defendants the Bills of Lading, and the first defendants subsequently took possession of the goods.

The first defendants had been for some time in a very shaky financial position, and, on the 31st of December 1932, they parted with the possession of the goods to the second defendants upon the following terms. They delivered a total of 535 cases to the second defendants at an agreed price of $13/- a case. This represent a sum of $6,955-. The second defendants, thereupon, extinguished a debt of $3,798.24, due to them by the first defendants, and gave them a cheque for $2,000/- to enable them to pay off a Chetty, and handed them $1,156- in cash.

The first defendants have made no payments to the Bank, and it was admitted that they are virtually insolvent.

On the 13th January 1933 the Bank, for valuable considerations, assigned the Bill of Exchange and all its rights of action to the plaintiffs.

It is clear that the first defendants were guilty of the grossest fraud. The main issue in this case is whether the second defendants received the goods "in good faith and without notice of any lien or other right of the original seller in respect of the goods." If these conditions were satisfied the second defendants would be protected by section 9 of the Factors' Act, 1889, which applies to this Colony. It is set out in Benjamin on Sales, 7th edition, 1931, at page 44:—

> "9.— Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge or other disposition thereof, or under any agreement for sale, pledge or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner".

Benjamin's commentary is—

> The only cases with which this section deals which are germane to the present Chapter are those in which a buyer transfers goods which have not yet vested in him—where, in fact, he has "agreed to buy." To enable him to pass a good title there must be (1) Possession of the goods or documents with the consent of the seller; (2) Delivery or transfer; and (3) Good faith, and absence of notice on the part of the second buyer of the seller's right of property. These conditions being satisfied, the first buyer is, with regard to the seller, in the position of the seller's mercantile agent under section 2 (1) of the Factors Act.

Section 2 (1) provides—

> "2.—(1) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent shall, subject to the provision of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

In *Heap* v. *Motorists' Advisory Agency* (1923) 1 K.B. 577 it was held that the onus lay on the third person of shewing that he acted in good faith and without notice: see Note (n) of Benjamin, 7th edition—page 35.

Mr. Saunders, for the second defendants, admitted that the onus lay on the second defendants if they came within the Act, his argument being that the Act did not apply to anyone in possession of goods with an authority to sell and here, the first defendants were expressly authorised by the owners, the Bank, to sell. But, if we examine carefully section 9, it is clear that it does govern our case.

It therefore only remains to be seen whether the second defendants have discharged the onus. Doulatram, second defendants' manager, admitted that the first defendants were indebted to them on two Promissory Notes and two bills. He had delivered goods to the first defendants in May for which he had received post-dated cheques that were subsequently dishonoured. Doulatram said that he knew on the 30th of December that the first defendants had received the ghee, and on the 31st December that they had stored it in a godown at 37 Victoria Street. Vengadasalam Chetty, a witness for the second defendants, said:—

> " T.R.M.V.S.T. VENGADASALAM CHETTIAR.
> "—Agent of Sithambaram Chettiar—134 Penang Street.
> "I know Das and Kishan Chand. Kishan Chan had "borrowed money from us. His last borrowing was on "24th November 1932 (T) for $2,000. There was a verbal "agreement in November that he would deposit cases of "ghee as security. He deposited the cases at a godown "at 37 Victoria Street. We had agreed about this place "in November. I got a godown receipt (U). Also a "key from Dass. On 31st December we got notice of "action from your—Hogan's-firm. This was about 3 p.m. "It was not given to me but to someone else. I had been "out. About 4 p.m. Das called me to his shop; Kishnan "Chand, Dass, Hermann Dass and Doulatram were there. "They had a conversation in their own language, and "then Dass asked me if I would return the key; and the "receipt and the Promissory Note if I were paid back. "I said 'yes'. Doulatram went out and fetched a cheque "and gave it to Dass; Dass indorsed the cheque and "gave it to me. I handed over the key the receipt and "the Promissory Note to Dass. I was not paid the "interest till later. I went home with the cheque. I paid "it to the Bank on the 3rd (through P.L.S.T.). The "cheque was returned to P.L.S.T. about 5 p.m.—dis-"honoured. I was informed. Dass came and told me "that I should pay it to the Bank on the 5th. I presented "it again on the 5th through P.L.S.T. It was then paid.
> " xxd. I had previous transactions with first "defendants. Nothing is now outstanding."

Now, Doulatram himself in cross-examination, said—

> " I agree that it was highly suspicious—this storing "of the goods in this way."

Further, he admitted that on the 3rd January he told Chua Soh Kok who had been plaintiffs' agent,

that the standing of the first defendants was very good and a telegram to that effect was sent to the Plaintiffs after having been written out in his (Doulatram's) presence.

Again, the second defendants could give no satisfactory explanation of the stopping and dishonouring of their own cheque for $2,000 to Vengadasalam Chetty. This cheque, which was dated 31st December 1932, was only paid on the 5th January after Dass, first defendants manager, had told the Chetty to present it on that date. There are other unexplained circumstances, e.g. why the second defendants kept the godown rent receipt, which they got from the Chetty.

Dass, the first defendants' manager, was present during the hearing of the case, but was not called by the second defendants. He seems to have worked in close co-operation with them throughout.

On the whole, therefore, looking only at the evidence put forward on behalf of the second defendants, I am satisfied that they have not discharged the onus of proving good faith and absence of notice. I do not say they were guilty of deliberate fraud like the first defendants, but they saw an unhoped-for chance of getting their money back, and jumped at the occasion without troubling about the consequences.

If it were necessary to look at the evidence adduced on behalf of the plaintiffs, (which, in my opinion, it is not), I believe Abraham Penhas, whose evidence was quite unshaken in cross-examination, and the other witnesses, except Tejah Singh. Though in certain details Tejah Singh's evidence is corroborated, yet I think it safer to disregard it altogether.

There will be judgment with costs against both defendants for the return of the cases, 535 in number, or their value at $12.50 per case, i.e., $6,687.30; and I also award the plaintiffs $300—as general damages for the conversion.

I shall forward all the papers to the Deputy Public Prosecutor for any action he may consider advisable as regards the first defendants.

Judgment accordingly.

Solicitors for the Plaintiffs—*Presgrave & Matthews.*

Solicitors for the Second Defendants—*Hogan & Ivens.*

F.M.S.

(Original Civil Jurisdiction)

Thorne, Ag. C.J.

July 29, 1932.

A. M. M. MURUGAPPA CHETTY .....Chargee

vs.

THE OFFICIAL ADMINISTRATOR AS ADMINISTRATOR OF THE ESTATE OF YAP CHOK, DECEASED .....Chargor

(Selangor Civil Application No. 350 of 1931)

and

IN THE MATTER OF THE ESTATE AND EFFECTS OF YAP CHOK, DECEASED

and

IN THE MATTER OF SECTIONS 34 AND 35 OF THE PROBATE AND ADMINISTRATION ENACTMENT, 1920.

(Selangor Originating Summons No. 50 of 1932) (Heard together).

Probate and Administration Enactment, 1920, Sections 34, 35 and Rule 1—Administration of property of deceased chargor——Lien of Official Administrator—Powers of the Chief Secretary to fix commission payable.

When a chargee realises his security under the Land Code, in respect of the lands of a deceased chargor, the administrator of the estate of the latter can only be said to have administered to the extent of any surplus produced by the sale, after deducting the amount due on the charge for principal, interest and costs.

When such an administrator is the Official Administrator, his lien, under Section 35 of the Probate and Administration Enactment, 1920, only attaches to this surplus and does not take precedence or priority over charges registered under the Land Code.

By virtue of the provisions of Section 34, the Chief Secretary has power to prescribe by rule the rate of commission payable on the value of the property administered by the Official Administrator.

Rule 1, (Gazette Notification No. 8305 of 21st December 1928) made under the provisions of Section 34 is *ultra vires* the powers of the Chief Secretary in that it purports to make a commission payable on the gross value of the estate, merely on the act of taking over the administration, which is in direct conflict with the provisions of the Section.

R. Ramani for the Chargee.

R. C. Cussen, Deputy Legal Adviser, for the Official Administrator.

The civil application and the originating summons were heard together on the 21st and 29th July, 1932, before Thorne, Ag. C.J.

The facts appear sufficiently from the judgment below.

Thorne, Ag. C.J.—The Official Administrator is the Administrator of the estate of one Yap Chok (deceased) who I will hereafter refer to as the deceased.

By a charge which bears the date 19th day of November, 1925, the deceased charged certain lands,